IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1976

NO. 76-1772

In the Matter of
HENRY CHONG TENN,
Petitioner,

v.

FIRST HAWAIIAN BANK,
Respondent.

In the Matter of
SYLVIA TENN LUCKFIELD,
Petitioner,

v.

FIRST HAWAIIAN BANK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

and

APPENDICES A TO E

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this case on March 15, 1977.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit, is published in

549 F. 2d 1356, and is reproduced as Appendix A to this petition. The unpublished Findings of Fact and Conclusions of Law, filed by the Referee in Bankruptcy (hereinafter "referee") and his attendant Order are reproduced as Appendices B and C to this petition. The Decision Sustaining Findings of Fact and Conclusions of Law and Order of Referee Denying Discharge of Bankrupts, filed by C. Nils Tavares, Senior Judge of the United States District Court for the District of Hawaii (hereinafter "district court"), is reproduced as Appendix D to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit (hereinafter "Ninth Circuit"), was entered on March 15, 1977, affirming the decision of the district court. Notice of entry of judgment is attached hereto as Appendix E. Jurisdiction is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

This petition for writ of certiorari challenges the construction and application of a federal statute, 11 U.S.C., Sec. 32(c)(3), by the district court, and the Ninth Circuit. Further review by this Court is sought because Petitioners believe

they have been deprived of a statutorily mandated discharge from bankruptcy in violation of the language and intent of the 1960 amendment (74 Stat. 408 [1960]) to said statute, and, through the judicial process, have been denied equal protection of the law as well as due process of law as mandated by the Fifth Amendment to the United States Constitution.

The questions raised are as follows:

1. Did the lower courts improperly classify Petitioners within the group that could be denied discharge under 11 U.S.C., Sec. 32(c)(3); that is, being "engaged in business as a sole proprietor, partnership, or as an executive of a corporation" at the time when they "obtained for such business money or property on credit or as an extension or renewal of credit"?

2. In light of the purposes of the 1960 amendment to 11 U.S.C., Sec. 32(c)(3); that is, to discharge the type of borrowers who are frequently victimized by lenders, do the lower courts commit reversible error when they presume bad motives on the part of the borrower, not the lender, especially when the proof shows full disclosure to the lender before the "loan" was granted?

3. Are the purposes for which 11 U.S.C., Sec. 32(c)(3) was amended to be defeated by

shifting the burden of proof from the lender to the debtor on the issue of whether the debtor acted with intent to defraud?

4. Inasmuch as the Ninth Circuit has previously recognized the propriety of reexamining legal conclusions of a bankruptcy referee, did it deny Petitioners due process of law and the equal protection of the law when it failed and refused to review questions of law raised by Petitioners?

5. Inasmuch as the Ninth Circuit has previously recognized that the creditor carries the burden of proving that the bankrupt's actions, however false, were taken with intent to defraud the creditor, did the Ninth Circuit deprive Petitioners of due process and the equal protection of the law when it inferred the intent to deceive without proof of same?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment of the United States Constitution, provides in pertinent part, that:

> "No person . . . shall be . . . deprived of . . . property, without due process of law . . . "

This case also involves 11 U.S.C., Section 32(c)(3):

> "32. Discharges granted. --
>
> "(c) The court shall grant the discharge unless satisfied that the bankrupt has . . . (3) while engaged in business as a sole proprietor, partnership, or as an executive of a corporation, obtained for such business money or property on credit or as an extension or renewal of credit by making or publishing or causing to be made or published in any manner whatsoever a materially false statement in writing respecting his financial condition or the financial condition of such partnership or corporation; . . . "

INTRODUCTORY STATEMENT

This petition presents to this Court the question of whether reversible errors of law were committed when the Petitioners were denied discharges in bankruptcy proceedings to which they were entitled under 11 U.S.C., Sec. 32(c)(3).

This petition also shows to this Court the need for this Court to speak on the question of whether the burden of proving positive fraud can be shifted from the creditor to the debtor.

STATEMENT OF THE CASE

A. Proceedings in the District Court.

Bankrupt Sylvia Tenn Luckfield (hereinafter "Petitioner") filed a petition in bankruptcy on November 3, 1972 (R. 1-16). Her brother, bankrupt Henry Chong Tenn (hereinafter "Petitioner") filed a petition in bankruptcy on November 6, 1972 (R. 17-28). On February 26, 1973, First

Hawaiian Bank (hereinafter "Respondent"), one of the Petitioners' creditors, filed Specification of Objection to Discharge of Bankrupt (R. 50-53; 54-56). Hearings upon such objections were held before the referee in bankruptcy, Honorable William B. Cobb, on April 23, 1973, and June 14, 1973. On September 13, 1973, Findings of Fact and Conclusions of Law were signed by the referee (R. 168-177), and Order denying discharge of the Petitioners was signed by the referee and filed therein on September 13, 1973 (R. 178-180). The Petitioners then petitioned for review of the referee's Findings of Fact and Conclusions of Law and Order claiming the said findings and conclusions thereof were clearly erroneous (R. 181-203). The petition for review was heard on March 13, 1975, before the district court. On March 20, 1975, the district court issued a decision sustaining the Findings of Fact and Conclusions of Law of the referee, and affirming the Order denying the discharge of the Petitioners (R. 255-256). Judgment denying Petitioners' discharge in bankruptcy was entered by the Clerk, United States District Court on April 4, 1975 (R. 257). Notice of Appeal was filed on April 9, 1975 (R. 258). Designation of Record of Appeal was filed on April 28, 1975 (R. 260-261), and Amended Designation of Record on

Appeal was filed on May 19, 1975 (R. 262-263).

In connection with the findings of fact of the referee, no transcript was prepared for the hearings of April 23, 1973, and June 14, 1975, but only a "Summary of Evidence" was prepared (R. 242-254).

B. Proceedings in the Ninth Circuit.

Pursuant to Rule 3(a), Rules of the Ninth Circuit Court of Appeals, the appeal was submitted for decision, without oral argument, on Tuesday, March 15, 1977. On even date thereof, the opinion set forth as Appendix A was filed affirming the judgment of the court below.

In said Opinion, the Ninth Circuit substituted certain of its own findings of fact for the findings of the referee in Bankruptcy, most importantly, that the deed executed in 1966 by the Petitioners' mother, by which she conveyed the fee to two of her children (the Petitioners) and reserved a life interest, "was false in that appellants' mother at all times owned the entire property, and her interest was not limited to a life estate. . . appellants' recordation of the deed which they knew was false for the purpose of obtaining an extension of credit on the basis of an asset that they did not own was a false statement of financial condition within the meaning of 11 U. S. C., § 32(c)(3)."

The Ninth Circuit's Opinion concludes that the recordation of this false deed in 1966 was in and of itself enough to justify denying the discharge of both Petitioners and found it unecessary to reach the remaining contentions of the Petitioners.

Not only was the loan in question not made until August of 1970, but was made before the Petitioners commenced the business of operating a U-Drive (the "loan" covered the balance due on an earlier borrower).

The Ninth Circuit, contrary to other of its decisions, considered the arguments of the Petitioners to be arguments addressed solely to the soundness of findings of fact. And while the Ninth Circuit stated it was according those findings great weight, it proceeded to "doctor and amend" those findings. Unfortunately for Petitioners, the Ninth Circuit neglected to apply the law, afresh, to its own amended findings.

The end result is that even though the Ninth Circuit found that Petitioners were not engaged in the U-Drive business when they applied for and obtained the loan in 1970, and even though it found that the "false statement of financial condition" was a deed executed by the Petitioners' mother in 1966, four years before the "loan," discharge was nevertheless denied.

REASONS FOR GRANTING THE WRIT

This petition raises significant issues concerning the manner in which the federal courts are interpreting and applying 11 U.S.C., Sec. 32(c)(3), which was amended in 1960 to prevent overreaching on the part of lenders who condone or even encourage borrowers to make false statements in order to preserve the lender's claim, even if the borrower went into bankruptcy. The wording of the amendment to the statute makes it clear that discharge is to be granted by the court unless it is satisfied that the bankrupt has,

> "(3) while engaged in business as a sole proprietor, partnership or as an executive of a corporation obtained for such business . . . money or property by making . . . a materially false statement in writing respecting his financial condition, or the financial condition of such partnership or corporation; . . . "

A. Contrary to the Philosophy Expressed By Congress That Creditors Were Not to be Allowed to Bar Discharges of Debtors, With Only Certain Exceptions, the Courts Below Reversed Presumptions and Construed the Law Against the Petitioners.

The decisions below have given the law an application that wrongfully restricts the right to discharge and overly broadens the class of debtors who may be denied discharge.

B. Contrary to the Express Wording of 11 U.S.C., Sec. 32(c)(3), Petitioners Were Saddled With the Burden of Proof on the Issue of Good Faith As to Matters Where the Court Found Bad Faith.

11 U.S.C., Sec. 32(c)(3), begins with these words:

> "The court shall grant the discharge unless satisfied that the bankrupt has . . . "

The law has been universally interpreted as requiring the objecting creditor to carry the burden of proving that the debtor acted with a corrupt motive or intent (Dixon v. Lowe, 177 F.2d 807 [CA 10]); further, the debtor has a statutory right to a discharge and the law must be interpreted liberally in his favor and strictly against the creditor. In re Kokoszka, (1973 CA 2) 479 F.2d 990, aff'd. on other grounds 417 U.S. 642, 41 L. Ed. 2d. 374, 94 S. Ct. 2431, reh. den. 419 U.S. 886, 42 L. Ed. 2d. 131, 95 S. Ct. 160; In re Jones, (1974 CA 5) 490 F.2d 452.

C. This Case Merits Review Inasmuch as the Ninth Circuit Found Facts Differently Than the District Court, but Nevertheless Retained the Lower Court's Erroneous Conclusions of Law.

ARGUMENT

Introduction

Today's social conditions require that an

even-handed justice prevail in bankruptcy proceedings and that statutory protections, including the burden of proving fraud and deceit, be strictly adhered to.

The Ninth Circuit's decision erroneously construes and applies 11 U.S.C., Sec. 32(c)(3), and the Petitioners have been unconstitutionally deprived of their right to a discharge set forth in said statute.

I.

The referee adopted the proposed Findings of Fact and Conclusions of Law prepared by the Respondent. (See Appendix B.) The findings are clearly erroneous in numerous respects; for example:

Finding No. 23.

> "On August 18, 1970, Henry Chong Tenn was engaged in the automobile rental business."

and

Finding No. 24.

> "On August 18, 1970, Sylvia Tenn Luckfield was engaged in the automobile rental business."

do not accurately reflect the evidence and are contradicted by the testimony of Respondent's principal witness, Rex Laurilliard, Assistant Vice President of Respondent: "I believe they were not engaged in business . . . " at the time

they signed the notes, August 18, 1970.

As a matter of fact, neither Henry Chong Tenn nor Sylvia Tenn Luckfield signed the notes under a d. b. a. Rather, they signed all papers in their individual names. They received no money, only the "rolling stock" of another party, a defaulted debtor of the bank. In exchange for this, they signed whatever papers the bank requested. Neither Mrs. Luckfield nor Mr. Tenn had ever been in the U-Drive business. It was only after the transaction with Respondent that Mrs. Luckfield went to the Department of Regulatory Agencies of the State of Hawaii, to register the trade name of "5 Island Rent-A-Car."

The actual commencement of business was further delayed by licensing procedures, police inspections and the like. Five automobiles out of 65 finally passed inspection. The business known as Henry Tenn and Associates, Inc., was incorporated on October 29, 1970, and did business under the name of "5 Island U-Drive" until August of 1971, when Respondent repossessed the cars.

On review, the district court stated that "a careful examination of the entire record . . . has failed to convince this court that the findings of fact of the referee are 'clearly erroneous'."

The Ninth Circuit observed:

"Appellants argue that the August 1970

loan was made to enable them to begin a car-rental business and therefore any false statement (e.g., the financial statement filed by Luckfield on July 27, 1970) was made prior to the time they were 'engaged in business' within the meaning of 11 U.S.C., §32(c)(3). Although superficially logical, this argument runs counter to the policy behind the "engaged in business" requirement. The 1960 amendment to the Bankruptcy Act, which added this requirement, was intended to distinguish between commercial borrowers (who are more likely to be aware of the severe consequences of issuing a false financial statement) and non-commercial borrowers. (See In re Butler, 425 F. 2d 47 [3rd Cir. 1970]; In re Weiner, 469 F. 2d 987 [5th Cir. 1972]). Since appellants are business people who obtained a commercial loan, they were appropriately found to be 'engaged in business'."

Thus, the Ninth Circuit recognized that the first and primary barrier to discharge did not exist; that is, the statements were not made "while" the Petitioners were in business. Findings 23 and 24 were clearly erroneous, even to the Ninth Circuit.

Stripped of its elegant sylogisms, the Ninth Circuit is saying, "It is true the bankrupts were not in business at the time they borrowed the money, but afterwards they engaged in business and this imposes on them retroactively severe consequences."

It is respectfully submitted that the Ninth

Circuit did not follow In re Butler, 425 F.2d 47 (3rd Cir. 1970), although it cited the case.

In re Butler, supra, clearly distinguishes between the situation where an unwary and unknowledgeable borrower applies for a loan, and the situation where a person actively engaged in a business venture knowingly or recklessly falsifies the financial condition of the business with intent to defraud the creditor.

The entire thrust of In re Butler is that Congress intended as "its primary purpose" to eliminate "non-business financial statements from the ground for the bar to a discharge." This thrust, the Ninth Circuit ignored.

A more "non-business" financial statement would be hard to find than in the instant case. More "non-business," disoriented, borrowers would be hard to find than in the instant case.

The Petitioners were not in business when the Respondent arranged for them to take over the automobiles on which the Respondent's first customer was already in default. The Petitioners went into bankruptcy because they were victimized into the belief that they were, in effect, receiving the where-with-all to commence and conduct a business.

The consideration failed.

The Ninth Circuit errs as a matter of law

when it modifies and amends the language of the statute.

II.

Instead of presenting the "proven" facts in a manner which reflects what was done by the Petitioners: (1) "while engaged in business" (2) to obtain money or property (3) by making materially false statement (4) with intent to deceive the Respondent (5) concerning their financial condition or the financial condition of their business, the findings of fact prepared by Respondent and accepted by the court reach back to December 16, 1966, four years prior to August 18, 1970.

In December of 1966, the mother of the Petitioners executed a deed by which Henry Chong Tenn was given a 1/3 interest, and Sylvia Tenn Luckfield received a 2/3 interest in the fee of residential property on Diamond Head, the mother reserving a life estate.

All of the above was made known to Respondent who verified same, and even contacted the first mortgagee of the property. Before the loan transaction to the Petitioners was approved, the Respondent was also told that the mother would not approve of a second mortgage.

The referee's various findings concerning this transfer to the Petitioners and from the Petitioners back to the mother are at conflict

with each other.

Findings 2 through 5 allege the 1966 transfer; Finding 19 alleges Petitioners intended to deceive the Respondent into believing they owned the property "which they never considered to belong to them;" Finding 20: "Bankrupts have failed to disprove an intent to deceive Bank in making the statements concerning ownership of Property which they never considered to belong to them;" Finding 22 is to the effect that Petitioners made statements regarding ownership of the property with reckless indifference to actual facts; Finding 32, that on August 30, 1971, the brother and sister reconveyed the property to the mother; Finding 33, that they made the conveyance to protect and preserve the property for their own use and benefit; Finding 34, that the conveyance back to the mother was without adequate or fair consideration; Finding 35, that by reason of the conveyance, Petitioners were made insolvent.

In the "Conclusions" signed by the referee, are the following:

> "4. Each of the Bankrupts has failed to explain satisfactorily the loss of assets caused by the conveyance of the Diamond Head Property to Mrs. Tenn.
>
> "5. Objector Bank has shown that these are reasonable grounds for believing that each of the Bankrupts has committed acts which would prevent a discharge of the Bankrupts under 11 U.S.C., § 32c.

> "6. Each of the Bankrupts has failed to meet the burden of proving that either of them has not committed an act under 11 U.S.C., § 32c."

As to the above, the reviewing district court "feels that the referee has adopted the sounder of the opposing authorities cited and believes and finds that, under the peculiar facts of this case, the referee's conclusions of law are also correct."

We come now to the Opinion of the Ninth Circuit which bluntly states:

> "Appellants face a heavy burden in attempting to overturn the denial of a discharge. The right to a discharge in bankruptcy is left to the sound discretion of the district court. The appellate court will not interfere except in a case of gross abuse of discretion. (Briskin v. White, 296 F.2d 132, 135 [9th Cir. 1961]) Findings of fact will not be overturned unless found to be clearly erroneous (Id. at 135; Hudson v. Wylie, 242 F.2d 435, 450-51 [9th Cir. 1957])."

The application of the above principal to the situation at hand is in marked contrast to the principals of law applied by the Ninth Circuit in other cases:

1. In re Amex-Protein Development Corp., 504 F.2d 1056 (9th Cir. 1974), stands for the proposition that the reviewing court remains free to examine the legal conclusions of the referee and reject them if they are erroneous.

There is no controversy as to facts. A deed was signed by the mother in 1966 reserving a life interest and conveying the fee to her two children. The children do not contest the fact that the real owner of the property continued to be the mother; the daughter explained to the Respondent, before the loan, that the Respondent could not take a second mortgage, because her mother would not like that. Therefore, we must now consider only a question of law: who had the burden of proving that the deed was drawn, executed, delivered, and recorded in 1966 with intent to defraud the Respondent in 1970? Obviously, the Respondent. And the referee erred as a matter of law in Finding 20, and Conclusions 4 and 5, set forth above.

2. In re Taylor, 514 F.2d 1370 (9th Cir. 1975), and Wright v. Lubinko, 515 F.2d 260 (9th Cir. 1975), illustrate that the Ninth Circuit is well aware that the burden is on the Respondent to prove actual or positive fraud; such fraud of the type involving moral turpitude or intentional wrong. There can be no mere imputation of bad faith. One test suggested in In re Taylor is whether the false representation was made with the intent and purpose of deceiving the creditor, and the Ninth Circuit went on to say:

> ". . . here we are governed by a special statute which places squarely on the shoulders of the objecting creditor the burden of proof in establishing the bankrupt's intent to defraud."

Even though there had been an illegal and improper transfer of assets, in the absence of proof of intent to deceive, the Ninth Circuit reversed and remanded concluding: "The debt should be ordered discharged."

Thus, the language employed by the Ninth Circuit in discussing the deed in this case is erroneous as a matter of law. Even though, "The bankruptcy judge and the district court judge could appropriately find that the deed was false . . . ", the court could not by "mere imputation" conclude that "the appellants obviously intended the bank to rely upon that false statement" and refuse the discharge.

III.

The referee's findings left us in an unpenetrable maze as to what constituted the alleged material falsification.

The Ninth Circuit Opinion makes a sweeping clarification when it declares that the referee and the district court could "appropriately" find "that the [1966] deed was false in that appellants' mother at all times owned the entire property, and her interest was not limited to a life estate."

"We hold that appellants' recordation of the deed [in 1966] which they knew was false for the purpose of obtaining an extension of credit on the basis of an asset that they did not own was a false statement of financial condition within the meaning of 11 U.S.C., § 32(c)(3)."

The above appellate result completely nullifies Conclusion 16 of the referee:

> "The deed dated August 30, 1971, from Bankrupts to Mrs. Tenn is fraudulent and void as against the claim of Bank."

Accepting the Ninth Circuit's determination that the 1966 deed was void, we must conclude that the 1971 transfer back to Mrs. Tenn was a redundancy and in no way affected the assets of the Petitioners.

Thus, it is the invalidity of the 1966 deed, alone, upon which the discharge is denied. In re Taylor, supra, and Wright v. Lubinko, supra, teach us that the false act must be done with intent to defraud the creditor--a legally impossible conclusion where a four-year gap separates the deed and the loan, and no showing was made by the Respondent that the transfer was made for any other purpose than to satisfy the mother's creditor, who wanted additional endorsers on the first mortgage in 1966.

CONCLUSION

For the foregoing reasons, Petitioners urge the Court to grant the writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

DATED: Honolulu, Hawaii, June 10, 1977.

Respectfully submitted:

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APPENDIX A

In the Matter of Henry Chong TENN,
Bankrupt-Appellant,

v.

FIRST HAWAIIAN BANK,
Creditor-Appellee.

In the Matter of Sylvia Tenn LUCKFIELD,
Bankrupt-Appellant,

v.

FIRST HAWAIIAN BANK,
Creditor-Appellee.

Nos. 75-2452, 75-2453.

United States Court of Appeals,
Ninth Circuit.

March 15, 1977.

The United States District Court for the District of Hawaii, C. Nils Tavares, J., affirmed bankruptcy judge's denial of discharges in bankruptcy, and bankrupts appealed. The Court of Appeals held that bankrupts, who were business people who obtained a commercial loan, were appropriately found to be "engaged in business" and that their recordation of deed which they knew was false for purpose of obtaining extension of credit on basis of asset that they did not own constituted false statement of financial condition

sufficient to justify denying discharges to bankrupts.

Affirmed.

OPINION

PER CURIAM:

Appellants Luckfield and Tenn appeal from orders denying them discharges in bankruptcy based upon determinations that both had obtained credit by publishing a false statement in writing respecting their financial condition in violation of 11 U. S. C. § 32(c)(3). On appeal they contend that they did not fall within 11 U.S.C. § 32(c)(3) because: They did not meet the "engaged in business" requirement of the statute; the deed that they executed and recorded was not a false statement in writing respecting their financial condition within the meaning of the statute; and they did not fail to explain the loss of assets under the statute. Tenn also contends that he could not be denied a discharge by reason of his knowledge of or acquiescence in the false financial statement which Luckfield delivered to the First Hawaiian Bank.

On August 18, 1970, the appellants obtained credit from the First Hawaiian Bank ("Bank") in the amount of $105,219.16 to purchase a fleet of rental automobiles from another customer of the Bank. Prior to the extension of credit by the

Bank, the appellants represented to the Bank that they were the owners of property located at 3755 Diamond Head Circle (the "Diamond Head property"), subject to a life estate in their mother. The Bank obtained a title report which showed that Tenn and Luckfield had undivided one-third and two-thirds interests, respectively, in the Diamond Head property, in which their mother had a life estate. The Diamond Head property had been conveyed to the appellants by their mother by a deed filed in the office of the Assistant Registrar of the Land Court of the State of Hawaii on December 30, 1966. Mrs. Luckfield also delivered to the Bank a financial statement dated as of July 27, 1970 which showed the net worth of Luckfield and her husband as $288,050. The major category of assets listed was under real estate owned with a value ascribed as $250,000 all of which was attributable to Luckfield's interest in the Diamond Head property. On September 9, 1971, a year after obtaining credit from the Bank, appellants recorded a deed reconveying title to the Diamond Head property to their mother. According to Luckfield, the Diamond Head property had always been owned by the appellants' mother and not by them.

In July 1972, First Hawaiian Bank sued Tenn and Luckfield in the state court of Hawaii to col-

lect approximately $70,000 which was due and owing. A default judgment was entered against Tenn and Luckfield, and the sheriff was sent to levy upon the Diamond Head property. The September 1971 reconveyance of title to Tenn's and Luckfield's mother prevented the Bank from levying on this property. In November 1972, appellants filed voluntary petitions in bankruptcy. The Bank filed objections to discharge. The bankruptcy judge denied them a discharge and the district court affirmed.

Appellants face a heavy burden in attempting to overturn the denial of a discharge. The right to a discharge in bankruptcy is left to the sound discretion of the district court. The appellate court will not interfere except in a case of gross abuse of discretion. (Briskin v. White, 296 F.2d 132, 135 (9th Cir. 1961).) Findings of fact will not be overturned unless found to be clearly erroneous. (Id. at 135; Hudson v. Wylie, 242 F. 2d 435, 450-51 (9th Cir. 1957).)

Appellants argue that the August 1970 loan was made to enable them to begin a car-rental business and therefore any false statement (e.g. the financial statement filed by Luckfield on July 27, 1970) was made prior to the time they were "engaged in business" within the meaning of 11 U.S.C. § 32(c)(3). Although superficially logical,

this argument runs counter to the policy behind the "engaged in business" requirement. The 1960 amendment to the Bankruptcy Act, which added this requirement, was intended to distinguish between commercial borrowers (who are more likely to be aware of the severe consequences of issuing a false financial statement), and non-commercial borrowers. (See In re Butler, 425 F.2d 47 (3d Cir. 1970); In re Weiner, 469 F.2d 987 (5th Cir. 1972).) Since appellants are business people who obtained a commercial loan, they were appropriately found to be "engaged in business."

We reject the appellants' contention that the deed was not a statement in writing respecting their financial condition. The bankruptcy judge and the district court could appropriately find that the deed was false in that appellants' mother at all times owned the entire property, and her interest was not limited to a life estate. The appellants obviously intended the Bank to rely upon that false statement in order to extend them credit. The evidence is very clear that the Bank did precisely that when it made them the loan. We hold that appellants' recordation of the deed which they knew was false for the purpose of obtaining an extension of credit on the basis of an asset that they did not own was a false statement

of financial condition within the meaning of 11 U.S.C. § 32(c)(3). (Cf. Scott v. Smith, 232 F.2d 188, 190 (9th Cir. 1956).)

Because we have decided that the recordation of the false deed was in and of itself enough to justify denying the discharge to both appellants, it is unnecessary for us to reach the remaining contentions of the parties.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

In the Matter of HENRY CHONG TENN, Bankrupt.	)	IN BANKRUPTCY No. 72-324
In the Matter of SYLVIA TENN LUCKFIELD, Bankrupt.	)	IN BANKRUPTCY No. 72-322

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

On April 23, 1973, in the United States District Court for the District of Hawaii, before the Honorable William B. Cobb, Referee in Bankruptcy, this matter came on for hearing on the Specifications of Objections t Discharge of Objector, FIRST HAWAIIAN ("Bank"), and Motion to establish the claim of Objector as non-dischargeable. Further oral arguments were heard on June 14, 1973. Bankrupts appeared in person and by their attorney, Richard M.C. Lum, Esq.; Bank appeared by its attorney of record, Michael S. Nabi, Esq., Cades Schutte Fleming & Wright of counsel.

The Court having considered the testimony of witnesses, the documentary evidence, having considered the respective memoranda and proposed findings of facts and conclusions of law submitted by counsel, and being otherwise fully advised in the premises now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Bankrupts, Henry Chong Tenn and Sylvia Tenn Luckfield (hereinafter "Tenn" and "Luckfield", respectively) are brother and sister; Hilda Bader Tenn ("Mrs. Tenn") is their mother.

2. On December 16, 1966, Bankrupts caused to be executed a Deed (the "Deed") in which they were named as Grantees of a certain parcel of real estate (the "Property") located at 3755 Diamond Head Circle in the City and County of Honolulu, State of Hawaii, said parcel being more fully described as follows:

> Lot 9, area 33,715.0 square feet, and Lot 41, area 676.0 square feet, as shown on Map 2 filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii (the "Assistant Registrar") with Land Court Application No. 1177 of Hawaiian Trust Company, Limited, Trustee, being all of the land described in Transfer Certificate of Title No. 113,099 issued to the Bankrupts.

3. The Deed was signed by the Bankrupts

and was filed with the Assistant Registrar on December 30, 1966, as Document No. 408207.

4. By so filing, the Deed was published or caused to be published by the Bankrupts.

5. The Deed recited that title to the Property was being conveyed to Tenn, as to an undivided one-third interest, and to Luckfield, as to an undivided two-thirds interest, both interests subject to a life estate in Mrs. Tenn.

6. Bankrupts never considered the Property to belong to them.

7. During the month of August, 1970, Bankrupts negotiated with Bank for the obtaining of a fleet of rental automobiles on credit.

8. In order to induce the Bank to extend credit to the Bankrupts, certain statements were made to the Bank by the Bankrupts.

9. Both Bankrupts told the Bank that they owned the respective interests in the Property stated hereinabove, despite their belief that the Property belonged to Mrs. Tenn.

10. Bank verified Bankrupts' assertion of ownership of the Property by obtaining from Title Guaranty of Hawaii, Incorporated an examination of the records of the Assistant Registrar and a written report thereof.

11. Between July 27, 1970 and August 17, 1970, Luckfield submitted to Bank the Personal

Statement (the "Personal Statement") of Sylvia T. and Marvin Luckfield, as at July 27, 1970, which statement was signed by Luckfield.

12. The Personal Statement showed under the heading "Assets" the category" Real Estate Owned" and ascribed an alleged value thereto of $250,000.00.

13. The Personal Statement listed purported liabilities totaling $55,700.00, but it did not list any indebtedness to Mrs. Tenn.

14. The Personal Statement showed an alleged "Net Worth" of $288,050.00.

15. Bankrupts have made no offer of proof of the value at any time of the fee simple interest in the Property nor of any lesser interest therein.

16. Luckfield has alleged that the entire fee simple interest in the Property has a value of $250,000.00, and she has never alleged that she owned, as of July 27, 1970, any real property other than the interest in the Property represented to the Bank.

17. The Personal Statement overstated assets, understated liabilities and, consequently, greatly overstated the net worth of Luckfield.

18. Both the statements concerning ownership of the Property and the Personal Statement were material in that the Bank would not have extended credit without a showing by Bankrupts

of the ability to repay the debt.

19. Bankrupts intended to deceive Bank by making the statements concerning ownership of Property which they never considered to belong to them.

20. Bankrupts have failed to disprove an intent to deceive Bank in making the statements concerning ownership of Property which they never considered to belong to them.

21. Luckfield actually knew that the Personal Statement contained false information.

22. Bankrupts made statements regarding ownership of the Property with reckless indifference as to actual facts.

23. On August 18, 1970, Henry Chong Tenn was engaged in the automobile rental business.

24. On August 18, 1970, Sylvia Tenn Luckfield was engaged in the automobile rental business.

25. There was a close and continuous and confidential relationship between Tenn and Luckfield during the negotiations with Bank for the extension of credit.

26. On August 18, 1970, Tenn and Luckfield jointly executed two transfers of equity whereby they agreed to assume the indebtedness to Bank of Travis Enterprises, Inc.

27. The effect of these assumptions was an

extension of credit to Bankrupts' business in the total amount of $105,219.16 in exchange for the transfer to Bankrupts of the equity in the fleet of automobiles used in their business.

28. The extension of credit by Bank to Bankrupts was obtained by false pretenses or false representations.

29. The extension of credit by Bank to Luckfield and the concomitant transfer of the equity in the fleet of automobiles were obtained in reliance upon a materially false statement in writing respecting her financial condition with intent to deceive.

30. The extension of credit by Bank to Tenn and the concomitant transfer of the equity in the fleet of automobiles were obtained in reliance upon a materially false statement in writing respecting his financial condition with intent to deceive.

31. Bankrupts' debt to Bank came due in August of 1971.

32. On August 30, 1971, Bankrupts executed a Deed conveying the Property to Mrs. Tenn, which Deed was filed with the Assistant Registrar on September 9, 1971, as Document No. 551341.

33. Bankrupts made the conveyance to protect and preserve the Property for their own use and benefit.

34. The conveyance was made by Bankrupts without adequate or fair consideration.

35. By reason of the conveyance, Bankrupts were left insolvent.

36. Bankrupts continued to live in the house on Diamond Head Circle after the conveyance, and they lived there at the time of the filing of their respective petitions in bankruptcy.

37. On September 1, 1972, Bank duly recovered a Judgment by Default against Bankrupts in an action in the Circuit Court of the First Circuit, State of Hawaii, entitled "First Hawaiian Bank, a Hawaii corporation, Plaintiff, vs. Henry Tenn and Sylvia Tenn Luckfield, Defendants," Civil No. 37131, which Judgment was in the sum of $70,508.64.

38. On October 18, 1972, an execution on the Judgment was duly issued to the Sheriff of the State of Hawaii, or his Deputy, which execution was returned by the Deputy Sheriff on November 9, 1972, wholly unsatisfied.

39. The conveyance of August 30, 1971 prevented and hindered Bank from collecting and receiving from the proceeds of any sale of the Property, on execution or otherwise, the amount due Bank on its Judgment against the Bankrupts.

40. Bankrupts each filed voluntary petitions in bankruptcy -- Tenn on November 6, 1972;

Luckfield on November 3, 1972 -- in this Court and were adjudicated to be bankrupts.

CONCLUSIONS OF LAW

Based on the above Findings of Fact, the Court concludes, as matters of law, that:

1. While engaged in the automobile rental business, each of the Bankrupts obtained for such business its inventory of rental automobiles on credit by causing to be published a materially false statement respecting their respective financial conditions.

2. While engaged in the automobile rental business, Luckfield obtained for such business its inventory of rental automobiles on credit by making a materially false statement in writing respecting her financial condition in the form of a Personal Statement.

3. By virtue of the close and confidential relationship between the Bankrupts and the continuing negotiations among Bankrupts and the Bank, and by receiving the benefits of the extension of credit, Tenn has obtained credit for his business by causing to be published a materially false statement in writing respecting the financial condition of his business and business associate in the form of the Personal Statement of Luckfield.

4. Each of the Bankrupts has failed to explain satisfactorily the loss of assets caused by the conveyance of the Diamond Head Property to Mrs. Tenn.

5. Objector Bank has shown that there are reasonable grounds for believing that each of the Bankrupts has committed acts which would prevent a discharge of the Bankrupts under 11 U.S.C. § 32c.

6. Each of the Bankrupts has failed to meet the burden of proving that either of them has not committed an act under 11 U.S.C. § 32c.

7. The objections raised by Objector Bank should be sustained.

8. Henry Chong Tenn should be denied a discharge herein.

9. Sylvia Tenn Luckfield should be denied a discharge herein.

10. This Court should determine the dischargeability of the debt of each of the Bankrupts to Bank in accordance with 11 U.S.C. § 35c(1).

11. The debt of Tenn to Bank represented by the Judgment held by Bank in the amount of $70,508.64, as of September 1, 1972, should not be discharged since the liability represented by the notes on which the Judgment was rendered was obtained by false pretenses or false representations.

12. The debt of Luckfield to Bank represented by the Judgment held by Bank in the amount of $70,508.64, as of September 1, 1972, should not be discharged since the liability represented by the notes on which the Judgment was rendered was obtained by false pretenses or false representations.

13. The debt of Tenn to Bank was obtained through Bank's reliance upon a materially false statement in writing respecting his financial condition made with intent to deceive.

14. The debt of Luckfield to Bank was obtained through Bank's reliance upon a materially false statement in writing respecting her financial condition made with intent to deceive.

15. This Court shall make such orders as are necessary to protect and effectuate its determination of non-dischargeability of debt and shall determine the remaining issues, render judgment, and make all orders necessary for the enforcement thereof, all in accordance with 11 U.S.C. § 35c(3).

16. The Deed dated August 30, 1971 from Bankrupts to Mrs. Tenn is fraudulent and void as against the claim of Bank.

17. The Orders of this Court, dated November 15, 1972, staying Bank, E. Gunner Schull, Michael S. Nabi, and all persons acting on its

behalf, from collecting the judgment obtained in Civil No. 37131 shall be rescinded.

DATED: Honolulu, Hawaii, September 13, 1973.

/s/ William B. Cobb
Referee in Bankruptcy

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

In the Matter of HENRY CHONG TENN, Bankrupt.	)	IN BANKRUPTCY
	)	No. 72-324
In the Matter of SYLVIA TENN LUCKFIELD, Bankrupt.	)	IN BANKRUPTCY
	)	No. 72-322

ORDER

It appearing that HENRY CHONG TENN of the City and County of Honolulu, State of Hawaii, was duly adjudged a bankrupt on a petition filed November 6, 1972, and that SYLVIA TENN LUCKFIELD of the City and County of Honolulu, State of Hawaii, was duly adjudged a bankrupt on a petition filed November 3, 1972; that due notice by mail was given to the creditors of each of the Bankrupts of the time fixed by the Court for filing of Objections to Discharge, and that, prior to the expiration of such time, Specifications of Objection were filed in each matter by FIRST HAWAIIAN BANK, a Hawaii corporation, and regularly brought on for hearing on April 23, 1973, pursuant to notice of such hearing given to each of the Bankrupts and to Objector First Hawaiian Bank, and First Hawaiian Bank appearing at such hearing by Michael S. Nabi, Esq., Cades Schutte Fleming & Wright of counsel, its attorney, and Bankrupts, Henry Chong Tenn and Sylvia Tenn Luckfield, appearing by Richard M. C. Lum, Esq., their attorney, and a hearing having been had, and further oral arguments having been heard on June 14, 1973, upon the basis of said Specifications of Objection, after hearing the evidence adduced, and upon the record in these proceedings and the argument of counsel, and the court having thereupon filed its Findings of Fact and Conclusions of Law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That Bankrupts, Henry Chong Tenn and Sylvia Tenn Luckfield, be, and each of them hereby is, denied a discharge herein.

2. That the order of this court restraining First Hawaiian Bank and its attorneys and all persons acting on its behalf from further action to collect its judgment is dissolved.

DATED: Honolulu, Hawaii, September 13, 1973.

/s/ William B. Cobb
Referee in Bankruptcy

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

In the Matter of HENRY CHONG TENN, Bankrupt.	)	IN BANKRUPTCY
	)	No. 72-324
In the Matter of SYLVIA TENN LUCKFIELD, Bankrupt.	)	IN BANKRUPTCY
	)	No. 72-322

DECISION SUSTAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDER, OF REFEREE DENYING DISCHARGE OF BANKRUPTS

This is a Petition for Review of Findings of Fact and Conclusions of Law, and Order, of the Referee in Bankruptcy denying a discharge of the Bankrupts. The Petition was orally argued before this court on Wednesday, March 19, 1975, and taken under advisement by the Court. The Court has now completed reading both files in the above entitled matters, which were consolidated for hearing, besides considering the oral arguments.

At the outset the Court is faced with Bank-

ruptcy Rule 810 reading:

> Upon an appeal the district court may affirm, modify, or reverse a referee's judgment or order, or remand with instructions for further proceedings. The court shall accept the referee's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge the credibility of the witnesses. (emphasis added)

A careful examination of the entire record, including, among other things, the SUMMARY OF EVIDENCE BEFORE REFEREE IN BANKRUPTCY, APRIL 23, 1973 AND JUNE 14, 1973, the numerous briefs or memoranda with their arguments, admissions and authorities, the exhibits admitted in evidence, plus, of course the oral arguments, has failed to convince this court that the findings of fact of the referee are "clearly erroneous". In fact, this court agrees with the same, insofar as it is possible for the court to get the entire picture from the record and other data above mentioned.

As to the referee's conclusions of law, based upon the authorities submitted and the record and admissions of the bankrupts and their counsel, this court feels that the referee has adopted the sounder of the opposing authorities cited and believes and finds that, under the peculiar facts of this case, the referee's conclusions

of law are also correct.

Rather than further lengthen the already extensive files in both cases by discussing a point by point summary of the court's reasoning in reaching the above conclusions, which are adequately, and, indeed, somewhat repetitiously, fully covered by the record before the referee, this court adopts the findings of fact and conclusions of law of the referee, and his Order issued pursuant thereto, and affirms the same.

DATED: Honolulu, Hawaii, March 26, 1975.

/s/ C. Nils Tavares
C. Nils Tavares, Senior Judge

APPENDIX E

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

March 15, 1977

RE: 75-2452) IN RE: HENRY CHONG TENN
75-2453) VS. FIRST HAWAIIAN BANK

Dear COUNSEL:

An opinion was filed and a judgment entered in the above case today, March 15, 1977 affirming the judgment of the court below (or administrative agency).

You have (14) days, from the above date, in which to file a petition for rehearing.

The mandate of this court shall issue (21) days after entry of judgment unless the court enters an order otherwise. If a petition for rehearing is filed and denied, the mandate will issue (7) days after the entry of the order denying the petition.

Sincerely,
/s/ Emil E. Melfi, Jr.
Emil E. Melfi, Jr.
Clerk of Court

See Rules: 36, 40(a) and 41(a) of the Federal Rules of Appellate Procedure